PRIVY COUNCIL REPORT

INTER EQUIPOS NAVALES S.A. v. LEW KAH CHOO & ORS.

[P.C. (Lord Keith of Kinkel, Lord Fraser of Tulleybelton, Lord Roskill, Lord Brandon of Oakbrook & Lord Mackay of Clashfern) October 23, 24 & November 18, 1985]

[Privy Council Appeal No. 32 of 1984]

Practice and Procedure – Appeal – Question of fact – Whether Court of Appeal justified in interfering with trial judge's findings of fact.

In this case the appellants claimed in respect of goods supplied on consignment to the respondents, pursuant to an arrangement the precise nature and extent of which were in dispute. The respondents contended that they had been appointed the appellant's sole agents and distributors for the Far East and Asean for a period of two years from January 1978. The appellants contended that the respondents were appointed distributors and that there was no sole agency and that the appointment was not for any fixed period. The claim and counterclaim relating to the commission on goods the subject of the claim were decided by the learned trial Judge and there was no appeal by either party. The respondents alleged in their counterclaim that the appellants by incorporating a company in May 1978 for the sale of the appellant's products in the Far East and Asean had breached the arrangement between them and they counterclaimed for damages. The appellants contended that the arrangement had been lawfully terminated on or about May 20, 1978 by reason of the conduct of the respondents in secretly and fraudulently manufacturing imitations of the appellant's products and offering them for sale in competition with the appellant's products at a lower price. The learned trial judge found that the respondents were the sole distributors or agents for the appellant's goods in the Far East and Asean and that in breach of the fiduciary duty which they owed to the appellants they had fabricated articles which were copies of the appellant's products without the knowledge or approval of the appellants. He therefore held that the appellants were justified in terminating the contract and no damages for breach of contract were due. The learned trial judge considered the issue he had to determine was essentially a question of fact and on this he accepted the evidence of the appellant's president and principal witness. On appeal to the Court of Appeal, the decision of the trial judge was reversed on the ground that the learned trial judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses which contradicted his findings on issues of fact. The appellant appealed to the Privy Council.

Held: the Court of Appeal was not justified in interfering with the trial judge's findings of fact on the basis of the reasons they gave for so doing. The appeal should be allowed and the order of the trial judge restored.

HIGH COURT (June 28, 1982).

Simon Elias for the plaintiffs.

Cheong Yuen Hee (*Roy Chua* with him) for the defendants.

Kulasekaram J. (delivering oral Judgment): In this case it is essentially a question of fact. One issue I have to decide is whether Merten's evidence should be accepted and what value to attach to it. The difficulty is in his statement that he saw his lawyer only after discovery of these fabrications by the defendants. It is there that I have some doubts. Merten's evidence is weak on this one point, whether he saw his lawyer before or after his finding out of the breach by the defendants. My finding is that the main reason for Merten taking the action was because on that day when he went to Jurong he found that these articles were being fabricated there. Merten was justified in so acting when he went to the place and found that the defendants were fabricating his goods without his knowledge and had thereby breached their fiduciary duty to him. This fiduciary duty arose from their relationship that the defendants were the sole distributors in this part of the world of the plaintiffs' goods. Now, as for the territories concerned, the defendants themselves in their advertisement say the Far East and South East Asia. There were no complaints from the plaintiffs about this. I find that they, the defendants, were the agents or sole distributors of the plaintiffs' goods for the Far East and South East Asia. And it is because of their breach of the fiduciary duty that Merten was justified in terminating the contract forthwith. I think in those circumstances it was not necessary for the plaintiffs to give any reasonable notice at all. The plaintiffs were entitled to terminate the contract forthwith. I accept Merten's evidence of what he saw that day. He was not quite accurate about what action was taken thereafter. He had suspected such activities for some time past; he had some information about it. Before coming to Singapore he had asked Hernandez to find out if this new company can be registered. He had that in the back of his mind as a possible course of conduct if his suspicions were confirmed. He would however not have taken any action but for the fact that when he visited the defendants' place at Jurong without prior notice to the defendants, he saw this fabrication taking place there. Once he saw it, that was it. I accept his evidence on that point. It was quite clear that the defendants were fabricating these goods without his knowledge. He was convinced that his earlier suspicions had been confirmed and that was the first time he knew about it for certain. He followed that up by letters and brought the matter to an end. That being so there shall be judgment for the plaintiffs for the full amount of claim

less $4,695.55 as admitted by the defendants. On the counterclaim the defendants are entitled to the commission on the Fukuoka contract. That was agreed between the parties at $38,541. As the statement of claim is in Deutsche Marks the full claim is for DM. 180,012 and the plaintiffs are entitled to be paid this amount in Deutsche Maiks. In arriving at this decision in this case I have considered all the evidence that has been placed before me. On the claim and counterclaim, one of the reasons why I wanted to give half the costs only to the plaintiffs was because it was Merten who prolonged this trial in various ways. In the event of an appeal the judgment sum is to be paid to the plaintiffs' solicitors who will place it in a deposit account.

Judgment for the plaintiff.

[The defendants appealed to the Court of Appeal.]

COURT OF APPEAL (Wee Chong Jin C.J., Sinnathuray & Abdul Wahab Ghows JJ., January 31, 1984).

Cheong Yuen Hee (*Roy Chua* with him) for the appellants.

Simon Elias for the respondents.

Cur. Adv. Vult.

Abdul Wahab Ghows J. (delivering the Judgment of the Court): The appeal arose from a claim by the respondents/plaintiffs (hereinafter called "the plaintiffs") for the sum of DM.180,012, being the value of the stock of goods delivered on consignment to the appellants/defendants (hereinafter called "the defendant") and for an account of what was due to the plaintiffs from the defendants by way of stock in defendants' possession and by way of the value of the plaintiffs' goods already sold by the defendants plus interest thereon and costs. The defendants admitted receiving the stock of goods referred to in para. 4 of the statement of claim and stated that they received DM.19,868.06 and S$4,695.55 for some of the plaintiffs' goods they had sold. They added that they had paid the said sum of S$4,695.55 to the plaintiffs' representative, Karl-Friedrich Birger Merten, in Singapore on behalf of the plaintiff and that as regards the sum of DM.19,868.06 the defendants said they were entitled to set off the same against damages suffered by the defendants as a result of the plaintiffs' breach of the oral agreement made on September 25, 1977 under which the plaintiffs appointed the defendants as their distributors and sole agents for their products marketed under the "Inter Equipos Navales" brand name in the Far East and Asean regions for a period of two years from January 1978. In breach of the said agreement, the defendants alleged, the plaintiffs on or about May 30, 1978 incorporated a company in Singapore known as Inter Equipos (Far East) Pte. Ltd. to sell the plaintiffs' products in the Far East and Asean regions. Thereafter the defendants had been unable to sell the plaintiffs' products. The defendants then counterclaimed for the sum of S$1,120,000 being 8% commission on the estimated turnover for two years at $7,000,000 per year and 8% commission on the invoice price of the parts mentioned in the contract signed with Fukuoka Shipyard for the construction of two vessels belonging to Tanaka Sangyo, plus interest thereon and costs.

In their Amended Reply the plaintiffs averred that by the oral agreement made on or about September 25, 1977, the plaintiffs provisionally appointed the defendants to be their distributor in Singapore, Malaysia and Hongkong but denied that this appointment was for a period of two years or for any fixed period, that the distributorship extended to any part of the Far East or the Asean regions other than Singapore, Malaysia and Hongkong, that the defendants were appointed their sole agents or that there was any agreement for the payment of commission to the defendants as alleged in the Defence and Counterclaim. The plaintiffs' Amended Reply then set out the terms of the said oral agreement made on September 25, 1977, the terms of the agreement between the parties made in November 1977 and the terms of another oral agreement between the plaintiffs and the defendants made on or about January 15, 1978.

The plaintiffs admitted in their Amended Reply that they caused a company named Inter Equipos (Far East) Pte. Ltd. to be incorporated in Southeast Asia and the Far East but denied that this was in breach of their agreement with the defendants or that the defendants suffered any loss thereby. In any case, the plaintiffs averred, the said agreement was discharged, or alternatively, lawfully terminated by the plaintiffs at the end of May 1978 by reason of the defendants' fundamental breach of the said agreement in that they secretly and fraudulently and in breach of their fiduciary duty to the plaintiffs caused imitations of the plaintiffs' products to be made and offered for sale and sold in competition with plaintiffs' products

and at lower prices and also by reason of the defendants constantly keeping relevant information secret from one Mr. Hernandez, the plaintiffs' delegate in Singapore, and ignoring his advice and directions and failing to refer to him the technical problems of customers of plaintiffs' products, whereby the reputation of the said products and the plaintiffs' goodwill suffered.

Kulasekaram J. gave judgment for the plaintiffs against the defendants for the sum of DM.180,012 less the equivalent in Deutschemarks of the sum of S$4,695.55 but allowed the defendants their counterclaim in respect of their commission arising from the Fukuoka contract in the agreed sum of $38,541.

The plaintiffs have also given notice asking for the aforesaid judgment to be varied by including interest on the sum awarded to them at 8% p.a. from May 20, 1978 until judgment.

At the conclusion of the hearing of the appeal we allowed the appeal with costs, set aside the aforesaid judgment, allowed the counterclaim and ordered the Registrar to assess the damages on the counterclaim. We now give our reasons.

It seemed to us that the issue whether or not the plaintiffs were in breach of their oral agreement with the defendants which was made on or about September 15, 1977 was the crux of the whole matter. Merten gave evidence to the effect that he suspected that the defendants had been fabricating his goods and had his suspicions confirmed on May 19, 1978 when he and Vincente Hernandez visited the defendants' factory at Jurong. So he terminated the plaintiffs' oral agreement with the defendants and incorporated the company called Inter Equipos Navales (Far East) Pte. Ltd. to look after his company's interests in Singapore. The learned trial judge in his oral judgment had this to say about Merten's evidence:

"One issue I have to decide is whether Merten's evidence should be accepted and what value to attach to it. The difficulty is in his statement that he saw his lawyer only after discovery of these fabrications by the defendants. It is there that I have some doubts. Merten's evidence is weak on this one point, whether he saw his lawyer before or after his finding out of the breach by the defendants. My finding is that the main reason for Merten taking the action was because on that day when he went to Jurong he found that these articles were being fabricated there. Merten was justified in so acting when he went to the place and found that the defendants were fabricating his goods without his knowledge and had thereby breached their fiduciary duty to him. This fiduciary duty arose from their relationship that the defendants were the sole distributors in this part of the world of the plaintiffs' goods. ... And it is because of their breach of the fiduciary duty that Merten was justified in terminating the contract forthwith. I think in those circumstances it was not necessary for the plaintiffs to give any reasonable notice at all. The plaintiffs were entitled to terminate the contract forthwith. I accept Merten's evidence of what he saw that day. He was not quite accurate about what action was taken thereafter. He had suspected such activities for some time past; he had some information about it. Before coming to Singapore he had asked Hernandez to find out if this new company can be registered. He had that in the back of his mind as a possible course of conduct if his suspicions were confirmed. He would however not have taken any action but for the fact that when he visited the defendants' place at Jurong without prior notice to the defendants, he saw this fabrication taking place there. Once he saw it, that was it. I accept his evidence on that point. It was quite clear that the defendants were fabricating these goods without his knowledge. He was convinced that his earlier suspicions had been confirmed and that was the first time he knew about it for certain. He followed that up by letters and brought the matter to an end."

The judge's findings of fact were, however, contradicted by the documentary and other unchallenged evidence adduced in this case. Mr. Tan Kay Bin, the plaintiffs' solicitor, said in evidence that on March 16, 1978 he was instructed by one James Khoo and Hernandez to find out if a company could be registered with the name Inter Equipos Navales (Far East) Pte. Ltd. That same day he wrote to the Registrar of Companies who replied on April 3, 1978 that the name proposed was available for registration. On April 13, 1978 he wrote to James Khoo informing him that the company documents were ready for signature and requesting him and Hernandez to call at his office to sign them. Towards May 1978 Tan Kay Sin was instructed that there would be three subscribers instead of two and that the third subscriber would be Merten. On May 19, 1978 in the afternoon, Merten, Hernandez and James Khoo attended at Tan Kay Bin's office and signed the company documents which were forwarded the following day to the Registrar of Companies. Tan Kay Bin's evidence was not challenged and is supported by certified copies of documents from the Registrar of Companies. The judge's oral judgment made no reference to the documentary evidence or to Tan Kay Bin's evidence or to the defendants' suggestion that the plaintiffs had all along planned to set up a local company without the defendants' participation and were falsely accusing the defendants of breach of fiduciary duty as an excuse for terminating the agreement between them. In our opinion, the judge failed to assess Merten's evi-

dence that he saw his lawyer only after discovery of these fabrications of the defendants against the background of the documentary evidence and the evidence of his lawyer.

The judge's oral judgment also did not mention the fact that Merten had agreed to the manufacture in Singapore of certain types of equipment to meet urgent orders.

On March 14, 1978 the following telex was sent to Merten:

"RE POSSIBLE MANUFACTURE OF SPREADERS IN S'PORE MR LIEW IS VERY INTERESTED IN THE MANUFACTURE OF SPREADERS IN SINGAPORE WITH INTER SPARE PARTS.

PLSE REPLY SOON.

V HERNANDEZ/J. KHOO

HCC"

Merten replied as follows:

"WE AGREE THE MANUFACTURE AT YR SIDE FOR THIS CASE OF LASHING BARS ST-5 ONLY.

REGARDS.

SD: MERTEN"

RE: MANUFACTURING OF SPREADERS IN S'PORE

ATTN: MR HDEZ

IN GENERAL WE ARE WILLING TO AGREE PROVIDED AGREEMENT REGARDING JOINT VENTURE WILL BE REACHED.

REGARDS.

SD: MERTEN."

In this connection the following telexes sent by the plaintiffs to the defendants on April 7, 1978 and April 13, 1978 are also relevant:

"THANKS FOR YR TX 7.4.78.

1. FOR O/CALCULATIONS AND QUICK OFFERS, WE ESTIMATE THAT VOYAGES FROM SPAIN TO S'PORE TAKES 24/30 DAYS. BUT THIS SHOULD BE COUNTED FROM SCHEDULE SAILING DATES. EARLIEST SAILING FROM BARCELONA IS 17.04.78 AND ARRIVAL IN S'PORE 10.05. IF THIS CAN'T BE ACCEPTED PLS MANUFACTURE YOURSELVES THE LASHING BARS AND SPLIT THE BENEFIT.

2. REGARDING THE SPREADER ALREADY SOLD IF NOTHING CAN BE DONE AS TO INTER'S BILLING, PLS ADVISE WHERE IS THE MONEY.

3. REGARDING O/LAST PARAGRAPH IN SPANISH LANGUAGE OF O/TX 1495, WE TRANSLATE IT :

"AS LONG AS THE NEW COMPANY ISN'T LEGALLY AND FORMALLY CONSTITUTED, MATERIALS IN STOCK IN S'PORE SHOULD BE BILLED BY INTER AS OWNER AND SELLER."

REGARDS.

INTER/AREAL."

"YR TX 1046-3-7
OUR 8032-3-78

KINDLY CONFIRM WHETHER YOU PROCEEDED WITH MANUFACTURING ACCORDING TO OUR TX 1529 AND FOLLOW THEN WITH COPY OF INVOICE TO CLIENT, AS WELL AS INFORMING OF BENEFIT.

BEST REGARDS.

INTER/DE ANDRES."

On April 14, 1978 the defendants replied as follows:

"BT-2 MANUFACTURING IN PROGRESS.

APPROXIMATE COSTS IS SD60.00 EACH (FULL DETAILS WILL FOLLOW LATER WITH COPY OF INVOICE TO CLIENT).

REGARDS.

INTER/HERNANDEZ."

The plaintiffs' delegate, Vincente Hernandez, arrived in Singapore in January 1978 and was working with and advising the defendants right up to the date Merten terminated the contract between the plaintiffs and the defendants. If there had been any unauthorised fabrication of the plaintiffs' equipment in the defendants' factory, he should have seen it. He was not called to give evidence and this the learned trial judge apparently failed to consider.

The proposal for a joint venture was raised in February 1978. Several telexes were exchanged between the plaintiffs and the defendants and a final draft of the joint venture agreement to form a company to be called Inter Lashing Systems Pte. Ltd. was signed on May 18, 1978 by Merten on the plaintiffs' behalf and by a representative of the defendants. The draft joint venture agreement was amended on May 19, 1978 and Merten's signature appears on the amendments. However, that same afternoon Merten, Hernandez and James Khoo

went to their solicitor's office and signed the documents to be forwarded to Registrar to incorporate their own company to be called Inter Equipos Navales (Far East) Pte. Ltd. Then on May 20, 1978 Merten sent the following letter to the defendants declining participation in the joint venture and in effect cancelling the agreement of September 25, 1977:

"Dear Sirs,

Re: Joint Venture

We have to confirm our today's meeting at the Singapore Hilton Hotel which took place in the presence of Mr G Q Ong, Mr Jimmy Lew, Mr V Hernandez and the undersigner. It was informed to Mr G Q Ong and Mr Jimmy Lew that Mr Hernandez is declining to be shareholder and Managing Director in a joint venture between Hock Cheong & Co and Inter. The reasons have been explained and will be confirmed by written letter by Mr Hernandez himself.

Inter facing this new situation has been forced to decline participation in the joint-venture as to the conditions negotiated with you previously in the past days. We have therefore taken following decision :

1. Removing the consignment stock from your premises to a bonded warehouse.
2. Engaged Mr Hernandez until further decision with the administration of this material.
3. Registering our name as private company in Singapore to provide legal backing of our interest.
4. Authorise Mr Hernandez to keep contact with all customers on Inter's behalf to secure orders of pending projects.
5. Give guarantee to Hock Cheong & Co for their commission on all projects pending until your no. 1068-5-78.
6. Provide the supply of possible orders to Hock Cheong & Co if any order would be booked by them ex our bonded stock at same price as indicated in your price list for consignation stock, granting your full commission.
7. The board of shareholders of Inter Spain will be informed of the new situation and authorisation will be asked for to re-negotiate with Hock Cheong & Co new conditions.
8. The undersigner suggest to meet Mr Lew or Mr Choo in Madrid or London in mid-June for new negotiations.

We trust that you will understand that without having a man of our confidence in a joint venture where we are supposed to have 51 percent we cannot go on for the time being. Besides it is of essential condition to have a technical standard and service guaranteed to the client which requires an adequate trained man in our systems.

We regret the actual situation and sincerely hope that a solution will be found quickly to satisfy all parties.

We remain Dear Sirs,

Yours faithfully

INTER EQUIPOS NAVALES, S.A.

SD: B MERTEN."

Yet despite the reasons given by Merten in this letter to the contrary, the learned trial judge found that Merten cancelled the agreement of September 25, 1978 because he had seen the fabricated equipment in the defendants' factory on the previous day. If it were true that Merten had seen the lashings and spreaders fabricated by the defendants without authority in the defendants' factory on May 19, 1978 he would have mentioned it in his letter as the reason for cancelling the agreement. He should have been angry at what he had seen and could not have forgotten it. He would not have been apologetic about terminating the said contract and would not have offered to re-negotiate a new agreement with the defendants. The trial judge plainly failed to apply his mind to these matters.

We were aware that normally an appellate court would not interfere with a trial judge's findings of fact as he had seen and heard the witnesses and would therefore be in a better position to assess their credibility. But in this case, it was manifestly clear that the learned trial judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses which contradicted his findings on issues of fact. After taking into consideration all the relevant evidence adduced in this case, we allowed the appeal.

[The respondents then appealed to the Privy Council].

PRIVY COUNCIL APPEAL FROM SINGAPORE.

George Newman Q.C. (*Austin Allison* with him) for the appellants.

Leolin Prince (*Cheong Yuen Hee and Andrew De La Rosa*) for the respondents.

Cur. Adv. Vult.

Lord Mackay of Clashfern (delivering the Judgment of the Board): This appeal from an order of the Court of Appeal in Singapore (Wee Chong Jin C.J., Sinnathuray and Abdul Wahab Ghows JJ.) dated July 8, 1983, the grounds of judgment for which were issued on January 31, 1984, setting

aside an order of Kulasekaram J. dated June 28, 1982, is confined to the question whether the counterclaim has been correctly dealt with in the courts in Singapore.

The plaintiffs, who are the appellants before this Board, are a company incorporated in Spain whose principal activity is the manufacture and sale of lashing systems for securing cargo and of cargo handling equipment, the latter category including spreaders which are used to lift containers from quay to ship or vice versa. The appellants' claim was in respect of goods supplied on consignment to the defendants, who are the respondents here, pursuant to an arrangement the precise nature and extent of which were in dispute. The respondents contended that by the arrangement made by oral agreement in September 1977 they were appointed the appellants' sole agents and distributors for the Far East and Asean (Singapore, Malaysia, Thailand, Indonesia and the Philippines) regions for a period of two years from January 1978. The appellants contended that provisionally in September 1977 and finally in January 1978 the respondents were appointed as their distributor for Singapore, Malaysia and Hong Kong only, that there was no sole agency and that the appointment was not for any fixed period. The claim and the counterclaim, so far as relating to commission on the goods which are the subjects of the claim, have been decided by the judge in a manner not criticised before their Lordships by either party.

In their counterclaim the respondents alleged that the appellants, by incorporating on May 30, 1978 a company for the sale of the appellants' products in the Far East and Asean regions, had breached this arrangement and they counterclaimed for damages for the unexpired portion of the two years' terms estimated at $1,120,000, being 8% on a turnover estimated by them at $7,000,000 per annum. The appellants replied that the arrangement had been lawfully terminated on or about May 20, 1978 by reason of the conduct of the respondents. The conduct of the respondents alleged by the appellants and relied upon as justifying this termination was that the respondents secretly and fraudulently manufactured imitations of the appellants' products and offered them for sale or sold them in competition with the appellants' products at lower prices.

After a trial which began on November 11, 1981 and occupied some ten days in all, having frequently been adjourned and eventually terminating in the afternoon of June 28, 1982, the judge immediately delivered an oral judgment in which he found that the respondents were the sole distributors or agents for the appellants' goods for the Far East and South East Asia, that in breach of the fiduciary duty which they in consequence owed to the appellants, the respondents were on May 19, 1978, fabricating articles in their factory in Jurong which were copies of the appellants' goods without the knowledge or approval of the appellants and that in consequence the appellants were justified in terminating forthwith the contract under which the respondents were appointed as sole distributors and agents for the appellants and no damages for breach of the contract were due.

The learned trial jduge considered the issue he had to determine was essentially a question of fact which depended on whether or not he accepted the evidence of Merten, the appellants' president and principal witness, that on May 19, 1978 he had seen the unauthorised fabrication taking place in the respondents' factory at Jurong. The learned judge accepted Merten's evidence of what he saw that day. Although the learned judge found for the appellants on the matter disputed before him, he awarded the plaintiffs only half their costs in the action since he held that Merten had prolonged the trial in various ways.

The respondents appealed to the Court of Appeal who reversed the judge's decision. In doing so they summarised their reasons thus:

> "We were aware that normally an appellate court would not interfere with a trial judge's findings of fact as he had seen and heard the witnesses and would therefore be in a better position to assess their credibility. But in this case, it was manifestly clear that the learned trial judge had overlooked or failed to consider vital documentary evidence and the unchallenged testimony of independent witnesses which contradicted his findings on issues of fact. After taking into consideration all the relevant evidence adduced in this case, we allowed the appeal."

Before considering the documentary evidence and the testimony of independent witnesses to which the Court of Appeal referred it is necessary to summarise the history of the relationship between the parties prior to May 19, 1978.

The first business contact between the appellants and the respondents was made through HCC Offshore Supplies (UK) Limited, the English company associated with the respondents. In about May 1977 the managing director of that compay,

Mr. Sonny Choo Swee Soon, contacted the appellants in Spain with a view to determining whether or not his company would be able to represent the appellants in selling container fittings and lashing equipment. After this initial contact the appellants began to supply the respondents with container fittings and lashing and handling equipment which the respondents paid for by means of letters of credit opened in the appellants' favour. Subsequently in about July 1977 Mr. Merten visited Singapore for the purpose of investigating the potential market for the appellants' products. While in Singapore, Mr. Merten visited the respondents' factory at Jurong and met the first respondent, Mr. Lew Kah Choo (also known as Michael Lew), the respondents' managing partner. It was proposed that the respondents should meet the appellants in Madrid to discuss representing the appellants in the sale of their container lashing products. Evidence was given on behalf of the respondents that at the time of Mr. Merten's visit to Singapore, the respondents were and previously had been dealing in container equipment, buying container fittings and lashing equipment from suppliers in Japan and the United Kingdom and manufacturing container handling equipment in the form of spreaders. However, Mr. Merten's evidence was that the respondents did not know what a spreader was and he denied that he had seen spreaders in various stages of construction at the respondents' factory in Jurong when he visited the factory in July 1977. The next meeting between the parties took place in September 1977 in Madrid; the appellants were represented by Mr. Merten and Mr. Vincent Hernandez and the respondents were represented by Mr. Michael Lew, Mr. Swee and Mr. Roy Chua. The respondents' case was that at this meeting it was orally agreed that the respondents were appointed the appellants' sole agents and distributors for the sale of their container fittings and lashing and handling equipment in Singapore, the Far East and Asean regions for a period of two years. The parties discussed arrangements for Mr. Hernandez to be sent to Singapore as the appellants' delegate for a period of two years commencing in January 1978 when Mr. Merten and Mr. Hernandez planned to meet with the respondents in Singapore. The appellants by their reply and defence to the counterclaim dated August 1, 1979 at first denied that there was any such oral agreement between the parties but by paragraph 3 of the re-amended defence to counterclaim dated November 25, 1981, filed after Mr. Merten had given evidence-in-chief at the trial on November 11 and 12, 1981, the appellants alleged that at the September 1977 meeting the respondents were provisionally appointed distributors of the appellants' equipment in Singapore, Malaysia and Hong Kong only. Moreover, the appellants alleged that at another meeting in Madrid in or about November 1977, the parties agreed upon the terms under which Mr. Hernandez would be sent to Singapore to work with the respondents in establishing their container equipment business and that those terms were recorded in a written memorandum signed by the parties at the November 1977 meeting.

In any case it was common ground that there was a further meeting between the parties on January 25, 1978 in Singapore when Mr. Hernandez was seconded to the respondents for a period of two years to assist in the organisation and running of their newly established container fittings and lashing equipment department. For the purpose of establishing this department, prior to the January 1978 meeting, the respondents hired Mr. Ong Geok Quee to act as the department manager and Mr. James Khoo to act as the department's sales and marketing supervisor. The terms which were agreed between the parties at the January 1978 meeting were recorded by Mr. Ong in the form of minutes which were initialled by Mr. Hernandez on behalf of the appellants. Mr. Hernandez also initialled an amendment to the minutes dated February 2, 1978. Mr. Merten's evidence was to the effect that the minutes which purported to record the confirmation of the respondents' appointment as sole agent and distributor for the appellants' products in Singapore, the Far East and South East Asia were not an accurate reflection of what had been agreed. Mr. Merten did not accept that the respondents became at this, or any other state, sole agent and distributor of the appellants' container lashing products. Following the January 1978 meeting, the respondents publicly announced their appointment as the appellants' sole agents and distributors in Singapore, the Far East and South East Asia by means of advertisements placed in the Singapore Press, a trade publication and a catalogue of the products offered for sale.

In a telex dated December 15, 1977 from the respondents to the appellants, the suggestion is first made that the two parties should jointly establish a new company for the marketing of the appellants' products. Thereafter, from early March 1978 down to the memorandum executed on May 18 and amended on May 19, 1978, the development of the proposals for the constitution of the joint venture company may be traced in the documentary record comprising the telexes exchanged

between the parties in March and April 1978. On March 13, 1978 the appellants telexed the respondents proposing, *inter alia*, that the new joint venture company should be named "Inter Lashing Systems Far East Ltd. (Pty)". The parties met on May 18, 1978 at the respondents' offices in Kallang to discuss the terms of the joint venture. The memorandum of the joint venture agreement reached on May 18, 1978 was prepared by Mr. Ong and signed by Mr. Merten on behalf of the appellants and by Mr. Michael Lew on behalf of the respondents. An amendment dated May 19, 1978 was also signed by Mr. Merten. After their meeting on May 18 the parties dined together at the Mandarin Hotel in Singapore and the following morning Mr. Michael Lew and Mr. Swee left Singapore to visit Taiwan and Japan.

Mr. Merten gave evidence that when he came to Singapore in May 1978 for the purpose of concluding the joint venture agreement, Mr. Hernandez showed him copies of two price quotations and a series of stock reports maintained by the respondents which recorded that in March 1978 samples of some of the appellants' products had been loaned to two foundries in Singapore for the purpose of obtaining production quotations. Mr. Merten's evidence was that these documents had been kept secret from Mr. Hernandez and that on May 19, 1978, after the joint venture memorandum and the amendment thereto had been signed, he and Mr. Hernandez visited the respondents' factory at Jurong and found that the respondents were manufacturing spreaders and a particular model of lashing bar which were copies of the appellants' products. According to Mr. Merten, this discovery confirmed suspicions Mr. Hernandez and Mr. Merten already had about the respondents and as a result, the appellants terminated their agreement with the respondents and immediately formed a new Singapore company, Inter Equipos Navales (Far East) Pte. Ltd., to market their products in place of the respondents. Mr. Merten said that it was necessary for the appellants to form the new company as the respondents were holding stocks of the appellants' goods which they refused to return and that accordingly he gave instructions to Mr. Hernandez to have the new company incorporated. He denied that before May 20, 1978 the appellants had the intention of setting up a Singapore company without the participation of the respondents and stated that he gave instructions to have the new company formed after the visit to Jurong on May 19. The directors and shareholders of the new company were Mr. Merten, Mr. Hernandez and Mr. James Khoo.

The first matter on which the Court of Appeal relied, as contradicting the findings of fact by the learned trial judge, was the evidence of Mr. Tan Kay Bin, the appellants' solicitor. He said in evidence that on March 16, 1978 he was instructed by James Khoo and Hernandez to find out if a company could be registered with the name Inter Equipos Navales (Far East) Pte. Ltd., and that he wrote to the Registrar of Companies who replied on April 3, 1978 that the named proposed was available for registration. On April 13, 1978 he wrote to James Khoo informing him that the company documents were ready for signature and requesting him and Hernandez to call at his office to sign them. Towards May 1978 Tan Kay Bin was instructed that there would be three subscribers instead of two and that the third subscriber would be Merten. On May 19, in the afternoon, Merten, Hernandez and James Khoo attended at Tan Kay Bin's office and signed the company documents which were forwarded the following day to the Registrar of Companies. He accepted, in answer to questions by the learned trial judge, that it was possible that he was given particulars of Mr. Merten for inclusion only on May 19. He further stated that the application for incorporation was completed so late on May 19 that he could not send it off till the next day.

The evidence of Mr. Tan Kay Bin was available to the respondents because Mr. Merten agreed in the course of his cross-examination that his solicitor should give evidence about when he gave instructions for the formation of their company. This evidence makes clear that instructions to proceed to incorporate the company were given for the first time late on May 19 and it appears to their Lordships that what preceded that date is explained by a desire on the part of Mr. Merten to keep his options open and to know whether he could proceed to incorporate, if necessary, a company in Singapore to look after the appellants' interests there if the negotiations with the respondents for a joint venture were not successfully concluded. This evidence also appears to fit Mr. Merten's assertions that Mr. Hernandez had before May 19, 1978 had suspicions about the respondents' conduct which he communicated to Merten in confidential conversation on the telephone and which was followed up by a guarded letter (exhibit D7 on page 234 of the Record).

The trial judge did consider this matter and felt there was a weakness in Merten's evidence on this point which gave him cause for some doubts but these were not sufficient to prevent him holding

that Merten's evidence on the principal matter in contention should be accepted. In their Lordships' view he was entitled to reach that conclusion.

The Court of Appeal next go on to find that the judgment of the learned trial judge did not mention the fact that Merten had agreed to the manufacture in Singapore of certain types of equipment to meet urgent orders. There was indeed evidence that Merten had agreed to the use of certain locally produced components in order to meet urgent orders for equipment in Singapore that could not be timeously supplied from Spain. There is, however, no evidence whatever that he had agreed to the manufacture of such major items as spreaders or that he had agreed to the manufacture of the EAT 3 units which he said he saw at Jurong on May 19. The documentary evidence is clear that he would consent to the manufacture of spreaders by the respondents only if the joint venture were agreed and in pursuance thereof. Any manufacture he saw on May 19, 1978 obviously did not fulfil the latter condition. It was neither suggested in the respondents' pleadings nor in cross-examination of Merten that he had agreed to the manufacture on May 19, 1978 by the respondents of spreaders and EAT 3 equipment identical to the appellants' equipment. That he had not done so is strikingly confirmed by the first respondent when he said in the course of his cross-examination:

"If we were manufacturing the spreader parts in May 1978 we would not be foolish enough to show Mr. Merten around the factory."

The Court of Appeal next point out that if there had been any unauthorised fabrication of the appellants' equipment in the respondents' factory, Hernandez should have seen it. They continue:

"He was not called to give evidence and this the learned trial judge apparently failed to consider."

Merten's evidence was that Hernandez was with him at Jurong on May 19, 1978 and that he also saw the unauthorised fabrication there on that day, but he explained the reason that he was not called. According to him, Mr. Hernandez had been the managing director of the appellants' new company incorporated, in accordance with the instructions given by Merten on May 19, 1978, till November 1978 when he left Singapore because he was threatened by the respondents and consequently he was not prepared to come to Singapore to give evidence. Mr. Hernandez had sworn two affidavits which were disclosed in the appellants' affidavit of documents. Counsel for the appellants applied to put these in evidence but this was objected to by counsel for the respondents and the application was refused. Their Lordships consider that, in these circumstances, the absence of Hernandez from the witness box did not preclude the learned judge from accepting the evidence of Mr. Merten on the crucial matter.

The final ground stated by the Court of Appeal for reversing the trial judge's finding was that the learned trial judge had in their view plainly failed to apply his mind to the stage the joint venture negotiations had reached by May 19, 1978 and the terms of Merten's letter of May 20, 1978 which they set out in full. They considered the terms of this letter surprising if Merten had seen unauthorised imitations of the appellants' products in the respondents' factory in Jurong the day before Their Lordships agree that the fact that this letter does not mention expressly the findings at Jurong made some explanation of it desirable. However, for whatever reason, this letter was not referred to in the cross-examination of Mr. Merten and their Lordships certainly cannot say that, if it had been, Merten would have been unable to produce a convincing explanation of its terms. The letter does mention that Hernandez was writing separately to explain why he was declining to participate in the joint venture in the manner in which it had been proposed that he should. He had not by then signed the joint venture documents although they had been drawn up with provision for his signature. In his letter of May 19, Hernandez said among other things:

"3. For several times Hock Cheong & Co. has tried to produce the same equipment as Inter without their consent."

Although this is not a precise reference to a finding of unauthorised manufacture on a visit to Jurong on that day it is certainly broad enough to include it and it is worthy of note that when the first respondent came to reply to this correspondence by telex of May 29, 1978 (AB 85 on page 215 of the Record), he does not in terms dispute this assertion in Hernandez's letter and says that the reasons given by Mr. Hernandez were of no significance as reasons for his resignation. It is also to be noted that although Merten's letter does not in terms express anger, the first decision reported in it is a very decisive departure from the stance of negotiating a joint venture and suggests that something fairly dramatic had occurred between the time when Merten signed the joint venture agree-

ment and the amendment to it and his writing of this letter. In the light of these considerations their Lordships are clearly of the view that the terms of this letter, unexplored in evidence, did not preclude the trial judge from holding that Merten's evidence of what he saw in Jurong on May 19, 1978 was true and it is clear that, in giving his oral judgement, the learned trial judge had this letter in view since he states that after Merten had received confirmation of his earlier suspicions by finding out for certain about the unauthorised manufacture "he followed that up by letters and brought the matter to an end".

For these reasons their Lordships have reached the view that the Court of Appeal were not justified in interfering with the trial judge's findings of fact on the basis of the reasons they gave for so doing.

Before this Board, counsel for the respondents urged upon their Lordships that the learned trial judge had not accepted the evidence of Merten on other matters, particularly with regard to the nature of the arrangement between the appellants and the respondents, and that since he had found Merten unreliable on other matters it was perverse for him to accept Merten's evidence on the crucial matter at least without giving very full reasons for his so doing. Their Lordships consider that while these other matters involve questions of Merten's reliability and the accuracy of his memory some three years after the events in question the central issue was one on which there was no room for mistake. On that issue either Merten's evidence was true or it was a deliberate falsehood. It was given clearly and considered by itself in the judge's notes it contained nothing which would stigmatise it as unworthy of credit. The only evidence challenging it was vague and unsatisfactory and no explanation was offered of how spreaders at various stages of manufacture but none finished came to be sitting in the respondents' factory at Jurong for a period of some two years. That evidence came from the first respondent. The person who actually received Merten and Hernandez at the factory was not a witness. Their Lordships would only add that it may well be that, in terminating the arrangement with the respondents, Merten had in view that it might have been profitable for the appellants to proceed on their own rather than by joint venture with the respondents, but if the respondents had manufactured spreaders in imitation of the appellants' equipment for sale in competition with the appellants and without their authority and thus committed a repudiatory breach of contract, the appellants were entitled to terminate the contract whatever motives they might have for grasping the opportunity to do so.

For these reasons their Lordships allow the appeal and restore the order of the trial judge. The appellants must have their costs in the Court of Appeal and before this Board.

Appeal allowed.

Solicitors: *Coward Chance; Jaques & Lewis.*